Supreme Court, U.S.
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No. 97-384

In The

Supreme Court of the United States

October Term, 1997

CONNIE C. RESHARD and LEROY RESHARD, as Co-Personal Representatives of the Estate of Minnie Lee Reshard,

Petitioners,

v.

DR. EARL BRITT; DR. GEORGE BONK; DR. PANKAJ CHOKHAWALA; DR. DAVID MOORE; TALLAHASSEE MEDICAL CENTER, INC., d/b/a TALLAHASSEE COMMUNITY HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT TALLAHASSEE COMMUNITY HOSPITAL'S BRIEF IN OPPOSITION

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RESPONDENT TALLAHASSEE COMMUNITY HOSPITAL'S BRIEF IN OPPOSITION

The Respondent, Tallahassee Medical Center, Inc., d/b/a Tallahassee Community Hospital [hereinafter Tallahassee Community Hospital],[1] respectfully requests this Honorable Court to deny the petition for the issuance of a writ of certiorari.

OPINION BELOW

The pertinent decisions of the United States Court of Appeals for the Eleventh Circuit, in this case, are as follows:

In *"Reshard II"*[2]
(The 1991 Appeal)

PER CURIAM:

> The issues Appellant raises in this appeal are meritless. *The district court committed no error, much less an abuse of its discretion, in* (1) refusing

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[1] The identities of all the Parties are included in the style of the case. The parent company of Respondent Tallahassee Medical Center, Inc., d/b/a Tallahassee Community Hospital is Columbia/HCA Healthcare Corporation. Tallahassee Medical Center, Inc., has no subsidiaries that are not wholly owned. Sup.Ct.R. 29.1.

[2] *Reshard I* affirmed an early Order of the Trial Court that Petitioners, in their representative capacities as Co-Personal Representatives of an Estate, could not appear *pro se*. *Reshard v. Britt*, 839 F.2d 1499 (11th Cir. 1988). On remand, Connie Reshard, a member of the Bar of the Commonwealth of Pennsylvania, appeared herein, *pro hac vice*, as Counsel for Appellants.

> to disqualify defense counsel; (2) refusing to grant the plaintiffs a default against the defendants; and (3) in *dismissing plaintiffs' wrongful death action with prejudice. Every finding of fact complained of is well supported by the record, and the court properly applied the law to each such finding.*
>
> AFFIRMED.

Reshard v. Britt, 976 F.2d 742 (11th Cir. [Case No. 91-3542] 1992), *reh'g en banc denied*, 981 F.2d 1264 (11th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993) (emphasis added) (*Reshard II*). Appendix to Petition for Certiorari at 34 [hereinafter cited as "Pet. App." followed by the appropriate page number].

In *"Reshard III"*
(The Decision Below)

> ORDER:
>
> Appellee Tallahassee Medical Center, Inc.'s motion to strike Appellants' corrected brief is GRANTED. Appellants are ORDERED to file a corrected brief deleting all arguments that the district court's dismissal of their complaint was improper. This issue was resolved against Appellants in 91-3542 [*Reshard II*].

Pet. App. at 10 (Order dated September 25, 1996).

> Appellants' "motion to vacate orders," construed as a motion to reconsider this court's 9/25/96 order striking a portion of Appellants' brief is DENIED. If Appellants do not file a corrected brief in full compliance with the 9/25/96 order within 14 days of the date of this order, the clerk is directed to dismiss this appeal

> for want of prosecution, *regardless* of whatever motions or pleadings Appellants may file.

Pet. App. at 5 (Order dated November 14, 1996).

> Appellants' "motion to vacate appeal no. 91-3542" is DENIED.
>
> Appellants' "motion for vacation by merits panel," construed as a motion for reconsideration of this court's 11/14/96 order, is DENIED.
>
> Appellee Tallahassee Medical Center's "suggestion to clerk for entry of court-ordered dismissal," construed as a motion to dismiss this appeal based on Appellants' non-compliance with this court's 11/14/96 order, is GRANTED.

Pet. App. at 3.

STATEMENT OF THE CASE AND FACTS

1. Adoption of the Trial Court Order and the Appellate Decision in *Reshard II*

This medical-malpractice case has been in litigation since 1985. In 1991, the District Court entered an Order dismissing Petitioners' Complaint with prejudice and requiring Petitioners to "pay to [Respondents] their expenses, including attorneys' fees, for all work and expenses related to [certain discovery proceedings]." Pet. App. at 36-38, 44. In so doing, the Trial Court adopted an Order, Report and Recommendation issued by the Magistrate Judge. Pet. App. at 44.

The Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit, where the District

Court's Order was affirmed. *Reshard v. Britt*, 976 F.2d 742, *reh'g en banc denied*, 981 F.2d 1264 (11th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993) ("every finding well supported" and law "properly applied") (hereinafter cited as *Reshard II*). However, the case was remanded so that the *amount* of the fees, to be taxed pursuant to the affirmed order, could be determined. From the Order setting that amount, the instant appeal was taken to the Court of Appeals below, where the appeal was dismissed for lack of prosecution. Pet. App. at 3 (that decision hereinafter cited as *Reshard III*). Petitioners now seek discretionary review of that dismissal.

The most telling item in the massive Record below is the sixty-three page Order, Report and Recommendation of the United States Magistrate, adopted and affirmed in *Reshard II*. R10-376; Pet. App. at 44. Expressly "based upon documents filed in this case, answers to interrogatories, transcripts of depositions, orders entered by this court, affidavits, and statements made to this Court by counsel . . . in hearings," it is replete with citations to the balance of the Record and it has been twice reviewed and upheld. Some of the more salient facts, set forth and documented there, are these:

(1) Petitioners, dating back to 1986, have "an extensive history of dilatory behavior" in this case, which has "continued unabated." R10-376-57.

(2) By their "numerous spurious motions . . . , frivolous but lengthy appeals of every order entered by the magistrate, and finally, willful disobedience" of court order, Petitioners have carried out a concerted campaign,

that began in 1986, to block the progress of this litigation. R10-376-57.

(3) Petitioners have made false statements of fact in sworn answers to interrogatories. R10-376-53, 58.

(4) Petitioner Connie Reshard has testified falsely, on deposition in this case, concerning substantive matters. R10-376-53.

(5) Petitioner/Petitioners' Counsel Connie Reshard has knowingly made false statements to the Court upon which the Court and opposing counsel relied. R10-376-39, 53.

(6) Petitioners willfully disobeyed a Trial Court order . . . and willfully attempted to obstruct the Trial Court by instructing a witness not to obey a lawful Subpoena. R10-376-53.

(7) Petitioners have been engaged in a "bad faith" and "intentional effort . . . to cause needless expense to [Respondents]." R10-376-36.

(8) Petitioners have made false and demonstrably baseless statements of medical "fact," in an effort to bolster claims that Respondents had destroyed evidence. R10-376-10.

(9) Petitioners have engaged in a "vindictive abuse of the adjudicative process," using it in the "malicious accusation" of those who oppose them. R10-376-11, 12.

(10) Petitioners have engaged in the "willful distortion of the plain words of this court's orders . . . throughout the unfortunate history of this case." R10-376-17, n.4.

It was upon these and similar findings, that the District Court ordered the dismissal of the Petitioners' Complaint with prejudice and awarded fees and costs incurred directly as a result of Petitioners' abuses. The Court directed the Magistrate to determine the precise amount of such fees incurred by Respondents; but, before that amount was set by the Magistrate, the Petitioners took the appeal in what became *Reshard II*. The Court of Appeals affirmed the dismissal and the award of fees and costs and remanded the case for a determination of the precise amount of the fees and costs incurred, and this Court denied certiorari. *Reshard II*.

2. *Reshard III*: The Trial Court Sets Fees and Costs Incurred and Petitioners Default on Appeal.

In the 1991 Sanctions Order, affirmed in *Reshard II*, the presiding Judge referred the matter of the *amount* of the awarded attorneys' fees and expenses, incurred as a result of Petitioners' misconduct, to the Magistrate Judge. R10-396-4. The Magistrate Judge gave Respondents thirty days within which to file affidavits documenting the fees and costs incurred, and gave Petitioners thirty days thereafter within which to file a "response and counter-affidavits." R10-397-1, 2. In the same Order, the Magistrate Judge required that any party, desiring an evidentiary hearing, "make such request by motion showing good cause why this matter cannot be determined on motions and affidavits, and responses thereto, without oral argument or evidentiary hearing." *Id*.

When Petitioners appealed in *Reshard II*, the Magistrate Judge stayed the fee-setting proceedings (R10-422-2), pending remand from the appellate court. Then, upon receipt of the Mandate from the Court of Appeals in *Reshard II*, affirming the District Court in every respect, the Magistrate Judge vacated the stay and again invited further evidentiary submissions from the parties. R11-439-3.

A. Trial-Level Fees of Respondent Tallahassee Community Hospital

In response to the Trial Court's orders, Respondent Tallahassee Community Hospital documented pertinent attorneys' fees and, in so doing, it submitted the affidavits of its counsel (R10-408 at Ex. A) and of another attorney (*id.*, at Ex. B) who was familiar with prevailing rates for legal services.[3] Although the United States Magistrate Judge had invited Petitioners to respond with "counteraffidavits" (R10-397-1, 2), Petitioners declined to

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[3] Those affidavits contained a detailed description of the work performed, counsel's experience, and counsel's range of hourly rates at the time, and stated that this Respondent had been billed at the lowest end of that range. R10-408 at Ex. A. The supporting affidavit stated that the witness was familiar with the prevailing rates charged in the community and with counsel for this Respondent, and opined that a reasonable hourly rate for said counsel in the instant case was actually higher than that charged and sought. *Id.* at Ex. B. Other Respondents tendered affidavits as well, pertaining to their respective fees and costs. R10-407, R10-410; R10-411; R10-412; R10-413; R10-414; R10-415; R10-416; R11-454; R11-458.

submit evidentiary material of any kind, nor did Petitioners request an evidentiary hearing.

After the affirmance and remand in *Reshard II*, the Magistrate again invited Petitioners to respond to the aforesaid "filings already of record" (R11-439-3); but Petitioners' again declined, and the Magistrate Judge adjudicated the matter. In so doing, the Magistrate Judge entered a Report and Recommendation which determined that the total hours devoted by counsel for this Respondent, for pertinent work before the Trial Court, was reasonable; and that the hourly rate charged for that was also reasonable. R11-446-4.

The Magistrate Judge allowed Petitioners fifteen days, after service of the Report and Recommendation, within which to "serve and file specific, written objections." *Id.* at 6. Petitioners filed an untimely response, twenty-four days later, in which they alleged generally that the Magistrate erred in determining both the number of hours and the hourly rate. R11-447-3. Thereafter, District Judge Stafford, "upon review of the submitted affidavits, and exercising [his] own judgment," and also having expressly considered Petitioners' untimely objections, adopted that portion of the Magistrate Judge's Report and Recommendation concerning this Respondent's attorney's fees and expenses for pertinent work before the Trial Court. R11-452-2, 3, 6.

B. Appellate Fees of Respondent Tallahassee Community Hospital

In the hope of deterring endless, frivolous appeals, this Respondent had also requested – in the Circuit Court

of Appeals – an award of such attorneys' fees for *Reshard II*. R11-442. The Court of Appeals granted the request in *Reshard II*, and it remanded for determination of the amount of appellate fees (along with the amounts of trial-court fees, in favor of each Respondent, the imposition of which it had affirmed). R11-440-1. Accordingly, this Respondent submitted, to the District Court, a copy of its Petition for Appellate Attorneys' Fees as originally filed in the Court of Appeals (which included corroborating affidavits). R11-442, Ex. A, B. Again, Petitioners filed no counteraffidavits or other evidentiary materials.

On July 27, 1993, the Magistrate Judge issued a Report recommending that the District Court enter judgment against Petitioners, for the proven amount of appellate fees, consistent with the Court of Appeals remand. R11-446-6. On review, District Judge Stafford determined that additional differentiation of appellate work was necessary. R11-452-5. Thus, the District Court directed this Respondent (and some of the other Respondents, regarding trial-court work) to submit "further itemization" (*id.* at 5) and remanded the matter to the Magistrate Judge for further consideration. *Id.* at 6. In response thereto, this Respondent submitted a sixteen-page affidavit reciting, in detail, the time devoted to specific tasks performed during the appeal. R11-455-Ex. A.

The Magistrate Judge entered an Order, on July 28, 1994, giving Petitioners until September 2, 1994, within which to "file objections, evidence and argument in reply" to this submission, as well as to similar submissions of certain other Respondents. R11-456-2. Petitioners then requested an extension of time, until September 12, 1994 (R11-464-2); and the Magistrate Judge extended their

time further, to October 7, 1994. R11-466-1. On October 11, 1994 (four days after the extended date), Petitioners filed their Response, yet they again failed to submit any counteraffidavit or other evidentiary material. R11-467.

The Magistrate Judge, in his ensuing Report and Recommendation, found that the number of hours expended by Counsel for this Respondent, in connection with the appeal in *Reshard II*, was reasonable. *Id.* at 5-7. Thereafter, Petitioners filed an untimely, undocumented and unverified Response (R11-470); and, after considering this Response, District Judge Stafford concluded that the Report and Recommendation should be adopted. R12-478-1, 2. Accordingly, a Judgment, determining the amount of attorney's fees and expenses, as to all Respondents, was entered on September 19, 1995. R12-479-1. *Reshard III*, followed by the instant Petition, ensued.

C. The Course of Proceedings Below: Obstinate Refusal to Prosecute the Appeal

In their appeal of the fee determination, Petitioners were over three months late in serving instructions regarding the compilation of the Trial Court record and in serving a required Civil Appeal Information Statement, before the first Motion to Dismiss [the appeal] for Lack of Prosecution was filed. Nevertheless, Petitioners did not file those required documents until weeks after the filing of that Motion. Thereafter, this Respondent filed a response to the Petitioners' Civil Appeal Information Statement, pointing out that the issues described therein had been previously decided in *Reshard II*. Petitioners replied with a "Response to Appellee's Objections" which

was filled with false and frivolous accusations against this Respondent, and it was ordered stricken by the Court of Appeals.

Petitioners' Initial Brief below was filed on the last permissible day; and it re-argued the issues that had already been appealed and decided in *Reshard II*, it exceeded applicable page limitations, and it did not comply with other rules regarding format. Petitioners then filed an unauthorized, re-written second "Initial Brief," representing that the second Brief was merely a printed copy of the first. The Clerk notified Petitioners that their second Brief did not conform to format requirements and directed the Petitioners to submit a "Corrected Brief" that remedied those deficiencies; and, on August 29, 1996, the Petitioners filed a third Initial Brief, which likewise failed to comply with the Court's procedural rules regarding the number of permissible pages.

In the meantime, on August 26, 1996, this Respondent moved the Court to strike the Initial Briefs, largely on the grounds that "the vast majority [of each brief] simply reargues the same issues that have been appealed to *and* already decided by this Court in Case No. 91-3542 [*Reshard II*];" and because Petitioners'/Appellants' excuse for that re-argument, i.e., that the appellate court lacked jurisdiction in *Reshard II*, was meritless. In response to that Motion, Petitioners again argued that the 1992 affirmance of the dismissal, *Reshard II*, was void for lack of jurisdiction. The Court below resolved the matter on September 25, 1996, when it issued the following Order:

> [Petitioners] are ORDERED to file a Corrected Brief deleting all arguments that the District Court's dismissal of their Complaint was

> improper. This issue was resolved against Appellants in 91-3542.

Pet. App. at 10. That Order was followed by Petitioners' "*Confidential* [sic] Amendment to Motion to Vacate Orders . . . ," thoroughly re-briefing their claim that the Court of Appeals lacked jurisdiction in *Reshard II* and that it lacked the authority, in *Reshard III* (the instant case), to have ordered the Petitioners to file a Corrected Brief "deleting all arguments that the District Court's [previously affirmed] dismissal of their Complaint was improper." Upon review of this and like motions for reconsideration, filed by Petitioners, the Court below reaffirmed its September 25, 1996, Order; and it spelled out the sanction that would befall Petitioners should they choose to ignore it:

> If Appellants do not file a Corrected Brief in full compliance with the 9/25/96 Order [so as to delete "all arguments that the District Court's dismissal of their Complaint was improper"] within 14 days of the date of this order, the Clerk is directed to dismiss this appeal for want of prosecution. . . . "

Pet. App. at 5. (TJOFLAT, ANDERSON and BIRCH, Circuit Judges) (Dated November 14, 1996).

On or about November 29, 1996, Respondents served their fourth, "Corrected" Brief; and, on Page 14 thereof, counsel for the Petitioners acknowledged their awareness of the above-quoted Order of November 14, 1996. Yet, at page xxi of the subject Brief, Petitioners claimed that the primary "issue" remained "whether sanction of dismissal of the wrongful death issue [was] . . . consistent with the requirements of due process"; and the first ten pages of

the Petitioner's "Statement of the Case" dealt exclusively with the propriety of the District Court's previously affirmed dismissal, as did the entirety of the Petitioner's "Statement of FACTS." The "Summary of Argument" portion of the subject Brief opened with the argument that the "dismissal of this case," by "the District Court Judges," should be vacated; and most of the "Argument" portion of the subject Brief flagrantly reargued – not that the *Reshard II* Court lacked jurisdiction – but that "it was an abuse of discretion [for the District Court] to dismiss the case." "Appellants Corrected Brief November 27, 1996" at 41. Finally, the bulk of Petitioner's "Conclusions" section was devoted to Petitioners' well-worn *Reshard II* charges that the District Court's "*dismissal* of this case should be vacated" [emphasis added] because of alleged "bias," "fraud" and the "tampering of the record" (by, Petitioners argue, virtually everyone involved in the case but them, including court personnel). *Id.* at 54.[4]

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[4] In other litigation, Petitioners' counsel has frequently made similar accusations, some of which are reflected in the record of other proceedings of this very Court. Thus, in her Appendix to her Petition for Writ of Certiorari filed in this Court in *Reshard v. Comm. on Admissions for Dist. of Columbia Court of Appeals* (Case No. 92-1290), 507 U.S. 988 (1993), Petitioner/Petitioners' counsel, Connie Reshard [*sub nom.* "C. Cornelia Reshard, Esquire"], acknowledged that the District of Columbia Court of Appeals Committee on Admissions to the Bar had expressed concerns

> "about allegations of bias and/or dishonesty made [by Connie Cornelia Reshard] against [United States District Court] Judge John Garrett Penn, and court reporters Harry Deustch and S. Popejoy, and what appeared to be allegations by [her] of bad faith on the part of Judge W. Bryant all made during the course of

Accordingly, consistent with the Scheduling Order of November 14, 1996, this Respondent again sought dismissal of Petitioners' appeal. In response, on December 5, 1996, Petitioners filed a "Motion to Vacate Appeal No. 91-3542 [*Reshard II*]" and yet another Motion that the Court reconsider its Scheduling Order of November 14, 1996. On January 15, 1997, the Court of Appeals denied the Petitioner's Motion to Vacate *Reshard II*; it denied their motion to reconsider its Order that Petitioners refrain from re-briefing the propriety of the Trial Court's 1991 dismissal affirmed in *Reshard II*; and it dismissed this, the latest appeal, "based on Appellants' non-compliance with this Court's 11/14/96 Order. . . . " Pet. App. at 3. Petitioners thereafter filed a 24-page "Suggestion of Rehearing (or hearing) En Banc," which was denied on April 29, 1997.

Reshard v. Burnley, U.S.D.C. D.C. Civ. No. 87-2794 JGP . . . . "

Id., Petition for Certiorari at 6, n.2. *See also*, Recommendation of the Committee on Admissions, *id.* at Appendix, which reports that "in cases [Petitioners' counsel] litigated *pro se*, she has made allegations of bias and/or dishonesty against two Federal judges and three court reporters." *Id.* at 28.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeals Properly Determined that the Trial Court Dismissal of the Petitioners' Complaint had been Resolved in *Reshard II*.

The Court of Appeals clearly had jurisdiction to decide the 1991 appeal in *Reshard II*, and the matters decided in that prior appeal are the law of the case. The Order appealed in *Reshard II* stated, "The complaint in this case is DISMISSED with prejudice . . . [and] Plaintiffs' [sic] and their counsel shall pay to defendants [certain of] their expenses, including attorneys' fees. . . . " R10-396-3; Pet. App. at 36-38. Such a dismissal "clearly is a decision that 'ends the litigation on the merits and leaves nothing for the court to do but execute a judgment.' " *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. 1982). The fact that the District Court's 1991 Order was entered as a sanction does not mean it is any less a determination on the merits, for "a punitive dismissal [under Rule 37] is equivalent to an adjudication on the merits." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 592 (9th Cir. 1983). The dismissal of an action with prejudice, entered as a sanction for a party's failure to comply with a court order to provide discovery, is a final, appealable order. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 680 (1958); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1410 (9th Cir. 1990) ("default judgment entered pursuant to Rule 37 is an appealable final order").

Petitioners' appeal in *Reshard II*, taken before the amount of attorney's fees could be determined, did not

vitiate the finality of the 1991 Order of Dismissal. This Court, in *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988), established a "bright-line rule . . . that a decision on the merits is a 'final decision' for purposes of § 1291 [appeal] whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202. In *Budinich*, the issue was whether a judgment for damages entered in the plaintiff's favor was a "final order," under 28 U.S.C. § 1291, even though the plaintiff's petition for attorney's fees remained pending. Prior to *Budinich*, some of the courts of appeals had held that, if an award of attorney's fees was part of the "merits," then there could be no "final decision," for purposes of section 1291, until the amount of attorney's fees was determined. *Id.* at 201. Under that approach, the appealability of an order, disposing of the underlying action, depended upon the characterization of a still-pending claim for attorney's fees.

But in *Budinich*, this Court disapproved that approach, reasoning that the "time of appealability, having jurisdictional consequences, should above all be clear," *id.* at 202, and that "the § 1291 effect of an unresolved issue of attorney's fees . . . should not turn upon the characterization of those fees." *Id.* at 201. The Court thus held that a decision on the merits is final, whether or not a request for attorney's fees, attributable to the case, remains for adjudication. *Id.* at 202.

This "bright-line rule," announced in *Budinich*, has been uniformly held to apply to cases involving an award of attorney's fees imposed as a sanction. *See Cooper v. Salomon Bros., Inc.*, 1 F.3d 82 (2d Cir. 1993) *cert. denied*, 510 U.S. 1063 (1994) (for jurisdictional purposes, Rule 11

sanctions are not substantively different from statutory attorney's fees; to the extent sanctions are aimed at punishment or deterrence rather than compensation, sanctions are even more collateral to the main action than are statutory attorney's fees); *Turnbull v. Wilcken*, 893 F.2d 256 (10th Cir. 1990) ("order which fully resolved all substantial issues on the merits . . . was a final judgment as to the merits, even though certain issues regarding the award of [attorney's fee] sanctions remained unadjudicated"); *Cleveland v. Berkson*, 878 F.2d 1034 (7th Cir. 1989) (dismissal of plaintiff's action, for failure to state a claim, was a final, appealable order, notwithstanding the pendency of the defendant's Rule 11 motion for sanctions in the form of attorney's fees). It is thus "bright-line" clear that the Court of Appeals panel that decided *Reshard II* (the prior appeal herein) had jurisdiction to decide the appeal as it did.

It is likewise clear that the Court's affirmance, in the prior appeal, was of Petitioners' liability for Respondents' attorney's fees, just as much as it was an affirmance of the Trial Court dismissal itself. An order determining *entitlement* to attorney's fees is reviewable on appeal, even though the amount of attorneys fees has not yet been determined, where the issue is raised in an appeal from an otherwise final order. *Andrews v. Employees' Retirement Plan*, 938 F.2d 1245 (11th Cir. 1991). *Accord, Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675 (D.C. Cir. 1996). Because the dismissal with prejudice was a final, appealable decision, the Court of Appeals, in *Reshard II*, also had jurisdiction to review the District Court's concomitant

decision to sanction Petitioners' with liability for Respondents' attorneys' fees and expenses (a review it conducted at Petitioners' behest). In fact, all of the issues that Petitioners raised in the instant appeal (*Reshard III*) – except for the *amount* of attorneys' fees set after *Reshard II* – were also raised by them in the prior appeal.

Moreover, under the Doctrine of Law of the Case, "findings of fact and conclusions of law by an appellate court are generally binding . . . on a later appeal." *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994). The doctrine encompasses all questions previously decided by the court, including those decided by necessary implication. *Id.* The prior appeal in *Reshard II*, and the appeal in *Reshard III* with respect to which the instant Petition is pending, arose out of the same case and involved the same parties; and the Court of Appeals had explicitly found, in *Reshard II*, that the District Court had not erred in dismissing Petitioners' wrongful death action with prejudice. Pet. App. at 34. In connection with the appeal of that issue in *Reshard II*, Petitioners argued then (as they also do now) that the District Court's determinations should be reversed because (i) Respondents concealed and destroyed evidence and engaged in other misconduct; (ii) the dismissal sanction was unwarranted because the Petitioners' conduct was not improper; (iii) the District Judge and Magistrate Judge [and, now, various judges of the Court of Appeals] are biased against Petitioners; (iv) the District Court lacked jurisdiction to enter the 1991 Order of Dismissal; and (v) Petitioners' rights to "substantive and procedural due process of law" were violated. Thus, the disposition of these issues, in the prior appeal, is the law of the case.

The only issue that was before the Court below, in the instant appeal, was whether the District Court abused its discretion in its determination of the exact *amount* of attorneys' fees awarded.

2. It Was Within the Discretion of the Court Below to Limit the Scope of Briefing and to Thereafter Dismiss the Appeal When Petitioners Refused to Comply.

By motion in the Court below, Petitioners repeatedly argued that they should be permitted to re-brief, in *Reshard III*, the propriety of the Trial Court dismissal that had been affirmed in *Reshard II*. Thereafter, the Court ordered Petitioners "to file a corrected brief deleting all arguments that the District Court's dismissal of their complaint was improper," finding that "This issue was resolved against Appellants in [*Reshard II*, Case No.] 91-3542." Pet. App. at 10. In response to Petitioners' request for reconsideration, the Court of Appeals (through a panel of three additional judges) warned Petitioners to "file a corrected brief in full compliance" with the earlier order, or face dismissal "for want of prosecution." Pet. App. at 5.

The Petitioners deliberately disregarded the Order and instead filed a brief that was focussed almost entirely on the merits of the 1991 dismissal and which was rife with the same false and offensive accusations that the Trial Court and Court of Appeals had to deal with in affirming that dismissal in *Reshard II*. Had the Petitioners chosen, instead, to simply re-argue that the Court of Appeals had been without jurisdiction to decide *Reshard*

II (rather than to focus almost entirely on the "merits" of that prior appeal), or had they simply chosen to argue the only true issue below – i.e., whether the Trial Court abused its discretion in setting the amounts of fees and costs – then Petitioners would simply have lost their appeal on the merits. Instead, by having flagrantly disregarded the Order below, Petitioners deliberately invited the resulting dismissal, the discretionary review of which they now seek in this Court.

Yet the pending Petition does not challenge the authority of the Court of Appeals to impose what it explicitly warned would befall Petitioners (i.e., dismissal for want of prosecution); and it is clear that the Court of Appeals had such authority. *See generally, Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Unquestionably, the Courts of Appeal have inherent, discretionary authority to dismiss an appeal for want of prosecution. *Thomas v. Arn*, 474 U.S. 140, 147 (1985) ("Had petitioner failed to comply with a scheduling order . . . that court [of appeals] could certainly dismiss the appeal"); *Link v. Wabash*, 370 U.S. 626 (1962) (recognizing "inherent power" of court to dismiss for want of prosecution). *See also, Anderson v. Dunn*, 19 U.S. 204, 227-28 (1821) ("Courts are universally acknowledged to be vested, by their very creation, with power to impose silence . . . in their presence and submission to their lawful mandates"). Additionally, the Federal Rules of Appellate Procedure expressly provide that the failure of an appellant to take *any* step, other than the timely filing of a notice of appeal, is ground for "such action as the court of appeals deems appropriate, which may include dismissal of the appeal." Fed. R. App. P. 3(a). Courts of appeals have, on numerous

occasions, dismissed appeals where appellants have impeded timely processing. *See, e.g., United States v. Consolidated Freightways, Inc.*, 178 F.2d 756 (9th Cir. 1949); *Taylor v. S & D Enterprises, Ltd.*, 601 F.2d 175 (5th Cir. 1979); *MacNeil Bros. Co. v. Forte*, 253 F.2d 500 (1st Cir. 1958); *Barber v. American Sec. Bank*, 841 F.2d 1159 (D.C. Cir. 1988); *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132 (4th Cir. 1988). *See also, Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132, 134 (4th Cir. 1988) (court notes that the appellant's conduct, in failing to prosecute the appeal, was consistent with conduct before the trial court).

By virtue of *Reshard II*, it had been established, beyond peroration, that "[Petitioner/Petitioners' counsel] Connie Reshard's failure to listen to [the] court when ordered to do something necessary to move this case along to a fair and just conclusion . . . has continued unabated throughout the unfortunate history of this case"; that Petitioners have filed "frivolous but lengthy appeals of every order"; and that they had previously been guilty of "willful disobedience" of lawful court order and of engaging in "bad faith" efforts to "cause needless expense" to the Respondents. Yet, in *Reshard III*, of which they now seek review in this Court, Petitioners took absolutely no positive steps to process the appeal (other than filing the notice of appeal), until motions were filed and orders were entered. Then, after their multiple, non-compliant briefs were filed and stricken – and after having briefed and lost, by Motion, their argument that *Reshard II* was void – Petitioners received and acknowledged a clear and concise scheduling Order that they file a properly limited brief by a date certain, or that

their latest appeal be dismissed for lack of prosecution. Petitioners chose to defy that scheduling Order, thereby bringing, upon themselves, the necessary result below.

3. Argument Petitioners Abandoned – that the District Court Abused its Discretion in Determining the Amount of Attorneys' Fees – is Meritless.

By failing to prosecute their appeal in the Court below, Petitioners waived further review of the only matter that was properly the subject of that appeal, i.e., the Order determining the amount of attorneys' fees. Pet. App at 14. Nevertheless, in an effort to obtain discretionary review in this Court, Petitioners complain that "the District Court set attorneys' fees and costs too high, and without holding a hearing," arguing that "Whenever disputable issues of fact exist . . . an evidentiary hearing must be held." Petition at 26. However, Petitioners' argument, with respect to the merits of the appeal dismissed below, is meritless.

It is well settled that the District Court "has great latitude in formulating attorney's fees awards," *Gilmere v. Atlanta*, 931 F.2d 811, 814 (11th Cir. 1991), and that the District Court's determination will not be set aside "absent a clear abuse of discretion," *King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980), regardless of whether or not it conducts an evidentiary hearing. As this Court stated in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), "[a] request for attorney's fees should not result in a second major litigation." Rather, the general rule is that evidentiary hearings are only "[o]ccasionally" necessary and that it "is perfectly proper to award attorney's fees based

solely on affidavits in the record." *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). Thus, contrary to Petitioners' argument, it is not true that an evidentiary hearing is necessary "[w]henever *disputable* issues of fact exist." Petition at 26 (emphasis added). An evidentiary hearing is required only where: (1) an evidentiary hearing has been requested, (2) there is a genuine dispute of material historical fact, and (3) the written record is not sufficiently clear to allow the trial court to resolve the genuine factual dispute. *Norman v. Housing Authority of Montgomery*, 836 F.2d at 1303-04.

As ordered by the trial and appellate courts herein, this Respondent submitted appropriate fee-and-cost affidavits, as did other Respondents. Petitioners, on the other hand, chose not to submit counteraffidavits or other evidence of any kind. As a result, the District Court's factual findings are not only amply supported by the Record, they stand uncontested; and Petitioners can identify no genuine dispute of material historical fact in the Record. Thus an evidentiary hearing was unnecessary. *See In re Holywell Corp.*, 967 F.2d 568, 571 (11th Cir. 1992) (fee opponent had not "demonstrated that the facts present[ed] an appropriate exception to the general rule" that an evidentiary hearing is not required).

Moreover, Petitioners' failure to timely file specific objections to the Magistrate's factual findings, thereafter adopted by the District Judge, effectively barred them from challenging those findings below, in the absence of plain error or manifest injustice. *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993). *See, CNPq-Conselho Nacional v. Inter-Trade, Inc.*, 50 F.3d 56, 57 (D.C. Cir. 1995) (by filing objections to magistrate's

report and recommendation one day late, appellant failed to preserve its objections for appeal). *See also* Fed. R. Civ. P. 72 (Committee Notes) ("Failure to make timely objection to the magistrate's report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order"). Thus, even though the District Court did consider and overrule Petitioners' untimely and vague objections, Petitioners nevertheless had waived them in the Trial Court, just as they were to later do by their misconduct in the Court below.

4. The Continued Pendency of this Twelve-Year-Long Wrongful-Death Case – Dismissed as a Sanction in 1991 – is an Embarrassment that Ought Not to be Prolonged or Endured by this Court.

Through Petitioners' unseemly and seemingly unceasing efforts, this meritless case has long been a shameful embarrassment to the judicial process. The Petition herein, especially portions of the Appendix, suggests only "the tip of the iceberg" of what has gone on in this most unfortunate case. Underneath, there lies a huge, morass of a Record reflecting litigious viciousness and misconduct of the rankest order, perpetrated in and upon the courts below for over twelve years, by Petitioners and by Petitioners' Counsel. In 1991, after much patient cajoling and then clear and stern warning – and only after Petitioners engaged in clearly contemptuous if not felonious behavior – the Trial Court saw fit to terminate this ugly abuse; and, in the ensuing appeal (*Reshard II*), the Court of Appeals found that Petitioners' points were meritless and that the Trial Court's devastating findings were fully sustained by the Record.

Five years later, in what should have been a simple appeal of a tangential matter before the Court below, the Petitioners continued their abuses; and now they again come to this Court, this time seeking relief from the consequences of having shown their contempt for the Court of Appeals that ruled against them in *Reshard II*. So, once again, this Respondent respectfully requests this Court to spare the parties and the courts below – and, indeed, the judicial process – from continued abuse at the hands of Petitioners; i.e., that this Court decline to add any semblance of life to this now-concluding tale of litigation horrors. This case – regardless of any "fact" or argument that Petitioners may make up or conjure up in their effort to keep it alive – is simply not worthy of this Court's attention, much less its discretionary review.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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